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17 LIVEWIRE SERVICES, INC.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

PERFECT 10, INC., a California
Corporation,

Plaintiff,

v.

GIGANEWS, INC., a Texas Corporation;
LIVEWIRE SERVICES, INC., a Nevada
Corporation; and Does 1 through 100,
inclusive,

Defendant.

GIGANEWS, INC., a Texas Corporation;
LIVEWIRE SERVICES, INC., a Nevada
Corporation,

Counterclaimants,

v.

PERFECT 10, INC., a California
Corporation,

Counterdefendant.

Case No. 11-cv-07098-ABC (SHx)

DISCOVERY MATTER
Before Hon. Stephen J. Hillman

**DEFENDANT GIGANEWS, INC.'S
MOTION TO STRIKE PERFECT
10'S SUPPLEMENTAL DISCOVERY
MEMORANDUM**

Date: February 10, 2014

Time: 2:00 p.m.

Ctrm: 550 (Roybal)

Discovery Cut-Off: June 30, 2014

Pretrial Conference: January 19, 2015

Trial Date: January 27, 2015

I. INTRODUCTION

Giganews asks the Court to strike Perfect 10's "supplemental memorandum" as (1) untimely with respect to its original motion (Dkt. No. 173, filed January 13, 2014), which has a hearing date of February 10, 2014, and (2) an attempt to deceive the Court with allegations of spoliation. Giganews requests as sanctions its fees in connection with this motion to strike the false and improper memorandum.

II. PERFECT 10'S SUPPLEMENTAL MEMORANDUM IS UNTIMELY.

Local Rule 37-2.3 is crystal clear:

Supplemental Memorandum. After the Joint Stipulation is filed, each party may file a supplemental memorandum of law **not later than fourteen (14) days prior to the hearing date.** Unless otherwise ordered by the Court, a supplemental memorandum shall not exceed five (5) pages in length. **No other separate memorandum of points and authorities shall be filed by either party in connection with the motion.**

The hearing date on the current motion is February 10, 2014. By filing a supplemental memorandum on February 4, 2014, Perfect 10 was impermissibly late.

**III. PERFECT 10 ASKED TO MEET AND CONFER AFTER IT FILED THE
SUPPLEMENTAL MEMORANDUM.**

Not only is Perfect 10’s filing untimely as a supplemental memorandum, but also Perfect 10 first raised the issues in its briefing in a January 28, 2014 letter, which requested the parties meet and confer on February 3, 4, or 5, 2014. Declaration of Kathleen Lu (“Lu Decl.”) ¶ 2. Giganews responded on January 31, 2014, rebutting all of Perfect 10’s points, but agreeing to a conference on the issues in the letter on February 4, 2014. *Id.* ¶ 3. Before this conference took place, however, Perfect 10 filed and served its supplemental memorandum on the very issues raised in its letter, going so far as to attach the letter and Giganews’s

1 response. *Id.* ¶ 4-5.

2 To the extent Perfect 10 is trying to shoehorn a new matter into the
 3 previously briefed motion, it acts improperly and has violated Rule 37-1 by failing
 4 to meet and confer *before* bringing a matter before the Court.

5 **IV. PERFECT 10 MISREPRESENTS THE FACTS.**

6 **A. Perfect 10 had failed to inspect the DMCA database.**

7 Perfect 10 told this Court Giganews has produced no discovery. This is
 8 deceptive. On January 29, 2014, Giganews informed Perfect 10 that its DMCA log
 9 database would be available for inspection at Giganews's facilities in Austin
 10 beginning on February 3, 2014. Lu. Decl. ¶ 8 Ex. B. Perfect 10 replied that it was
 11 not available on February 3. *Id.* Giganews informed Perfect 10 that the database
 12 would be available for inspection at a later time as well and asked Perfect 10 to
 13 provide a convenient time for it to begin inspection. *Id.* Perfect 10 has thus far
 14 refused to provide a date. *Id.*

15 Perfect 10's arguments about Giganews's DMCA database are distortions.
 16 Mr. Yokubaitis testified that "**We have a record of notice receives [sic] and how**
 17 **they were processed**" (Lu Decl., Ex. A at 129:25-130:1), that he did not know the
 18 dates, but that "**Our chief technical officer, I believe, would know.**" *Id.* at 130:23-
 19 24. Perfect 10 deposed Mr. Yokubaitis in his personal capacity, but Giganews has
 20 repeatedly offered its chief technical officer, Philip Molter, for deposition on March
 21 1, 2014, in both his individual capacity and as a representative of the company. Lu
 22 Decl. ¶ 8 Ex. B. Despite three requests for a confirmation of this date, Perfect 10
 23 has refused and has not offered any alternative mutually convenient date. *Id.*

24 Furthermore, because Giganews has also offered to make its entire DMCA
 25 database available for Perfect 10's inspection at its facilities in Austin, Perfect 10
 26 can inspect for itself the dates available in the database. It has simply chosen not to
 27 do so because it insists that only Mr. Zada can perform the inspection (a condition
 28 Perfect 10 first raised at the February 4 conference, see Lu Decl. ¶ 6), not Perfect

1 10's lawyers, their staffs, or their consultants, and because the parties have a
 2 continuing dispute (in Defendants' pending objections to the protective order) over
 3 whether Mr. Zada can have special, non attorney, access to attorney's eyes only
 4 materials.

5 **B. Perfect 10 distorts the testimony on customer records.**

6 Perfect 10 selectively and misleadingly excerpted Mr. Yokubaitis's transcript.
 7 (Giganews furnishes the entire transcript so that the Court may see the entire
 8 context if it wishes.) Perfect 10 implies falsely that the testimony about *Usenet*
 9 *users in general* was actually about *Giganews customers*. The District Court has
 10 noted Perfect 10's failure to distinguish between the two: "Many of the messages
 11 hosted on Giganews servers are posted through accounts registered with other
 12 Usenet providers." Order Dkt. No. 180, at 10. "[T]hat a Usenet server provider
 13 cannot identify all users whose messages reside on its servers appears to be a
 14 function of how the entire Usenet works." *Id.* During the deposition Mr. Yokubaitis
 15 explained Giganews's records regarding *customers* accused of infringement:

16 A. And the X-Trace is 256 bit encoding of
 17 various customer information so we can locate
 18 and record which customer got this, on whose
 account it was posted from.

19 Lu Decl., Ex. A (Yokubaitis Depo.) at 56:4-6.

20 Q. And from the X-Trace, you can locate the
 21 customer, but is that the only information that
 22 you receive from the X-Trace?

23 MR. BRIDGES: Objection, vague and ambiguous.
 24 You may answer.

25 A. There is more information there, I believe -
 26 -- there is more information than just the
 27 customer number, the customer's Giganews ID
 28 number. I think we forwarded that information
 to you. But I can't remember each one of the
 factors that are in there, there are not many,
 but -

29 *Id.* at 58:4-14.

30 Perfect 10 instead quotes a section of the transcript regarding "individuals"
 31 generally, not *Giganews customers*. Perfect 10 also confused the issues by asking

1 about "a record of individuals" immediately after this testimony about X-Trace,
 2 indicating that Perfect 10's definition of a "record" is something other than
 3 X-Trace. *Id.* at 58:15-17.

4 When Perfect 10 asked more precise questions, the transcript becomes clear:

5 Q. When you receive the DMCA notice from a
 6 copyright holder ... do you contact the customer
 7 who posted the allegedly infringing material?
 8 MR. BRIDGES: Objection. Objection, lacks
 9 foundation, vague and ambiguous. You may answer.
 10 A. Okay. Do you contact -- yes, ma'am.
 11 Q. How do you contact those individuals?
 12 A. Email.
 13 Q. Do you maintain those emails?
 14 A. Maintain them?
 15 Q. Do you still have them?
 16 A. I don't know how far back but we have emails of
 17 our contacts.
 18 Q. Do those emails consist of both your Giganews
 19 contacting the individual and the individual
 20 returning an email?
 21 MR. BRIDGES: Objection, vague and ambiguous, lacks
 22 foundation.
 23 A. They may or may not respond.
 24 Q. Do you have records or do you have emails to
 25 and/or from alleged infringers dating back to 2009?
 26 MR. BRIDGE: Objection, vague and ambiguous, lacks
 27 foundation.
 28 A. I don't know for sure. I believe so, but I don't
 know for sure, ma'am.
 18 Q. Do you -- who would know?
 19 A. Our CTO, Phil Molter.
 20 Q. And he would have access to that information,
 21 the actual emails?
 22 A. Yes, ma'am, or our -- yes, ma'am.

23 *Id.* at 59:10-60:16. Giganews has repeatedly offered its chief technical
 24 officer, Philip Molter, for deposition in both his individual capacity and as a
 25 representative of the company, an offer Perfect 10 has so far refused.

26 **C. Perfect 10 bases its accusation on "irrelevant emails like spam."**

27 Perfect 10's accusations of wrongful deletion of emails is balderdash. The
 28 witness testified that Giganews receives "*irrelevant emails like spam.*" *Id.* at
 189:12-13. Perfect 10 then asked what Giganews did with "*irrelevant
 communications.*" *Id.* at 190:8. In other words, Perfect 10 asked the witness what

1 he thought the company did with “spam.” There is nothing remarkable in the
 2 witness’s response that the Company trashes irrelevant emails like spam.

3 “[T]he duty to preserve only extends to documents relevant to the claim of
 4 which the party has notice[.] *In re Pfizer Inc. Sec. Litig.*, 288 F.R.D. 297, 317
 5 (S.D.N.Y. 2013). Perfect 10’s question clearly and specifically asked about
 6 “*irrelevant* communications.” Lu Decl., Ex. A at 190:8. Perfect 10 now attempts to
 7 mislead the court by suggesting this statement could refer to DMCA notices.

8 **D. Perfect 10 misrepresents Giganews’s responses to discovery.**

9 Because Perfect 10 filed this brief without conferring with Giganews, Perfect
 10 misstates Giganews’s actions regarding the identity of customers Perfect 10 has
 11 accused of infringement. Perfect 10 asked Mr. Yokubaitis “Has anybody – anyone
 12 at Giganews, excepting your counsel, made an effort to determine the *legal name* of
 13 BillC@myplace.com?” *Id.* at 55:4-6. Before this question, Perfect 10 asked about
 14 customer information like “their name on the credit card.” *Id.* at 54:11-12.
 15 Giganews cannot know if that is a *legal name* of the *user*; it is the apparent name of
 16 the *payor*. At the conference, Giganews’s counsel informed Perfect 10 that
 17 Giganews had notified the affected customers and would provide account
 18 information, (e.g., the name associated with a payment method), after the end of the
 19 customer objection period. Lu Decl. ¶ 6.

20 **V. CONCLUSION**

21 The Court should strike Perfect 10’s untimely and deceptive supplemental
 22 memorandum and award Giganews its fees in connection with this motion.

23 Dated: February 6, 2014

FENWICK & WEST LLP

24 By: /s/ Kathleen Lu
 25 Kathleen Lu

26 Attorneys for Defendant
 27 GIGANEWS, INC.